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Supreme Court, U.S.
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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

[redacted]

EX PARTE ABRAM C. WISNER

9 Orig'l.

O.T.1906

PETITION FOR WRIT OF MANDAMUS

ORIGINAL PROCEEDING No.

OLIVER & MECARTNEY,
JONES, JONES & HOCKER,
J. J. DARLINGTON,
Counsel for Petitioner

IN THE

Supreme Court of the United States

EX PARTE ABRAM C. WISNER

PETITION FOR WRIT OF MANDAMUS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Abram C. Wisner, respectfully shows to this Honorable Court:

That on the 17th day of February, A. D. 1906, your petitioner commenced a civil action at law by attachment in the

Circuit Court in and for the City of St. Louis and State of Missouri, against one John D. Beardsley, by filing in said court a petition, together with an affidavit that said Beardsley was not a resident of said State and was a resident of the State of Louisiana (in conformity to the statutes of said State concerning attachments), returnable to the April Term of said court, to recover from said Beardsley on a cause of action set forth in the first count of said petition the sum of eighty-five thousand dollars, for breach of a certain option contract, executed and delivered by said Beardsley to your petitioner for the sale, transfer and delivery by said Beardsley to your petitioner of a majority of the shares of the capital stock of the Louisiana and Northwest Railroad Company, and for the sale to petitioner of another certain contract between said Beardsley and said Railroad Company under which said Beardsley had built the line of railroad owned by said company in the States of Louisiana and Arkansas, by the terms of which said Beardsley was to receive, and there was due and owing to him bonds of said Railroad Company, secured by first mortgage upon its property, aggregating one million seven hundred and twenty-five thousand dollars, together with all rights, benefits and advantages, accrued or to accrue to said Beardsley under said contract, and for all of which your petitioner was to pay said Beardsley the sum of $1,495,000 in the manner specified in said contract, and also to recover on another and different cause of action, in the second count of said petition set forth, fifteen thousand dollars for goods sold and delivered, money paid and laid out and expended by your petitioner for said Beardsley at his instance and request, and money had and received by said Beardsley to the use of your petitioner.

And your petitioner further shows to the Court that upon the filing of said petition and affidavit in said Circuit Court a writ of attachment in the usual form, issued out of said Circuit Court, in due course in said cause on the said 17th day of February, A. D. 1906, dated on said day, directed to the sheriff

of said City of St. Louis, commanding him to attach the said John D. Beardsley by all and singular his lands, tenements, goods, chattels, rights, moneys, credits, evidences of debt or so much thereof as should be sufficient to satisfy the plaintiff's claim, and also that he summon as garnishees all persons in whose hands or possession soever any personal property, rights, credits, evidences of debt, effects or money of said defendant might be, or who might be named by the plaintiff in said cause (your petitioner herein) or his attorneys, as garnishees, and that they said garnishees so summoned to appear before said Circuit Court of the City of St. Louis on the first day of its next term to be holden on the first Monday, the second day of April, 1906, and said writ was returnable to the first day of the next term of said court to be held in said city on the first Monday of April, 1906, to-wit, April 2, 1906, which writ was in due course delivered to said sheriff; and that said sheriff, as appears from his return on said writ, dated the 17th day of March, A. D. 1906, made to said April Term of said court, according to the command of said writ, executed said writ, on said 17th day of February, by returning that no goods, chattels or real estate were found by him in said city belonging to the defendant, the said John D. Beardsley, whereon to levy said writ and make the debt and costs, and by thereupon attaching by direction of your petitioner's attorneys, in the hands of the Mississippi Valley Trust Company, a corporation in said City of St. Louis, by a written declaration (as required by the statutes of said State in such cases made and provided) directed to the said corporation, and delivered said declaration to Breckenridge Jones, Vice-President of said corporation (he being in the office of said corporation and having charge thereof), all debts due from it to said defendant in said action, John D. Beardsley, and all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt of or belonging to the said defendant in said action, the said John D. Beardsley, or so much thereof as would be sufficient to satisfy the

debt, interest and costs of said action, and by summoning it in writing as garnishee by a written summons of garnishment, directed to said corporation and delivering the said amount of garnishment to said Breckenridge Jones, Vice-President thereof, requiring it to appear before said Circuit Court at the return term of said writ, to-wit, on the first Monday in April next, to-wit, April, A. D. 1906, to answer such interrogatories as might be exhibited and propounded to it by the plaintiff named in said summons; and your petitioner further shows that said writ also directed the sheriff of said city to summon the said John D. Beardsley to be and appear at the then next term of said Circuit Court and before the Judges thereof, on the first day of the then next term of said court to be holden in the City of St. Louis on the first Monday of April, 1906, to-wit, on the second day of April, 1906; and as appears from a further return made by said sheriff of said writ to said court as aforesaid, said sheriff also executed said writ on the 17th day of March, A. D. 1906, by delivering in said City of St. Louis, a copy of the writ and petition as furnished by the clerk of said court to John D. Beardsley, the defendant therein, thereby summoning the said defendant to be and appear before said court on the day named in said writ, which said summons was executed in the manner and form provided by the statutes of said State for the personal service of process in civil actions.

And your petitioner further shows to the Court that on the 17th day of March, A. D. 1906, and before the commencement of the April Term of said Circuit Court (that is before the first Monday in April, A. D. 1906), to which said writ of attachment and said summons of garnishment was returnable, and before the filing of the petition and bond for the removal of said action from said Circuit Court of the City St. Louis hereinafter set forth and described, and before and without the filing by your petitioner of the interrogatories which the laws of said State require to be filed by the plaintiff in cases of

garnishment and before the time limited in said laws for the filing of interrogatories had run or expired, and before the return day of said cause, to-wit, on the said 17th day of March, 1906, The Mississippi Valley Trust Company, garnishee in said action as aforesaid, filed in said Circuit Court of the City of St. Louis, answers to certain purported interrogatories, in which answer to said purported interrogatories it stated among other things, as follows:

(Answer of Garnishee.)

"Further answering said interrogatories, said garnishee states that it has in its possession property belonging to said John D. Beardsley, or in which he may be interested, consisting of the amounts of bonds of the Louisiana and North West Railroad Company hereinafter described.

"Said garnishee further states that it is a corporation organized under the laws of Missouri, and among other powers, is authorized to act as trustee under corporate mortgages; that it is trustee under a mortgage deed of trust of the Louisiana & North West Railroad Company, a corporation organized under the laws of the State of Louisiana, dated the first day of April, 1905, securing an authorized issue of bonds of said Railroad Company to the amount of $10,000,000 of even date with said mortgage, bearing interest at 5% per annum, payable semi-annually as evidenced by interest coupons thereto attached, which bonds are payable on the first day of April, 1935; that said mortgage provides none of said bonds shall be valid until authenticated by this garnishee as trustee and said mortgage fully sets out the terms and conditions upon which the bonds are to be authenticated; that said garnishee files herewith printed copy of said mortgage as Exhibit 'A' to this, its answer; that under article 2, section 1 of said mortgage, it is provided, among other things, that said garnishee, as trustee shall authenticate bonds to the amount of $1,725,000, face value, and deliver to the Railroad Company, or on its order, on filing with the trustee a copy of a resolution of the board of directors

of said railroad company, certified under the corporate seal thereof by a proper officer, requesting such delivery; that pursuant to the provisions of said mortgage, on or about the 12th day of February, 1906, there was filed with said trustees a certified copy of minutes of meeting of the board of directors of said railroad company held January 15, 1906, at which meeting said directors adopted resolutions directing the delivery of $1,725,000 face value of bonds, and under the terms of said mortgage it became the duty of said trustee to authenticate and deliver such bonds upon receipt of said certified copy of said minutes; that all of said bonds were authenticated as provided in said mortgage on the 16th day of February, 1906; that among the resolutions adopted by said board was a resolution as follows: 'The trustee in the first mortgage is further requested to deliver to J. D. Beardsley or order first mortgage gold bonds of the face value of $230,000, and to Geo. W. Hunter and J. D. Beardsley, or upon their joint order, first mortgage gold bonds of the face value of $320,000'; that none of said $230,000 or of said $320,000 of bonds have been delivered by said garnishee as trustee aforesaid, and at the time when garnishment process was served as aforesaid, said bonds duly authenticated were, and since that time have been, and at the present time are, in the hands of this garnishee as trustee under the conditions aforesaid. What are the rights of said Beardsley to said $230,000 face value of bonds or said $320,000 face value of bonds, this garnishee has no information beyond what is herein stated."

And your petitioner further shows the Court that afterwards at the February Term of said Circuit Court and on the 17th day of March, A. D. 1906, and before the day of the commencement of said April Term aforesaid, and before it was required by the laws of the State of Missouri, or the rule of said State court in which said action was brought, to answer or plead to the said petition filed therein as aforesaid, the said John D. Beardsley, the defendant in said action, by his attorneys, Stewart, Eliot & Williams and Moore, Smith & Moore,

made and filed in said action in said Circuit Court in and for the City of St. Louis and State of Missouri, for the removal of said action from said court last aforesaid into the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, the Circuit Court of the United States to be held in the district where such action was pending, the petition and bond required for removal of causes by the third section of the Act of Congress of August 13, 1888, amendatory of the Acts of March 3, 1887, and March 3, 1875, which said petition was and is in the words and figures following:

(Petition for Removal.)

In the Circuit Court of the City of St. Louis, Missouri, April Term, 1906.

"Abram C. Wisner, Plaintiff,
vs.
John D. Beardsley, Defendant.

To the Honorable ....., *Judge of the Circuit Court of St. Louis.*

"Your petitioner respectfully shows that he is the defendant in the above entitled suit, and that he is a non-resident of the State in which the said suit was brought, to-wit, Missouri, and the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of $2,000;

"That the said suit is of a civil nature, being a suit, upon the first count, brought by the plaintiff for the breach of a contract or option given him by the defendant for the sale, transfer and delivery to plaintiff of a majority of the shares of the capital stock of the Louisiana and North West Railroad Co., together with the right, interest and title of the defendant in a certain contract between said defendant and the Louisiana & North West Railroad Co. for the issuance and delivery to the defendant of the first mortgage bonds of said Railroad Company of the aggregate face value of $1,725,-

000; that for the alleged breach of said contract plaintiff claims he was put to great expense and trouble, and expended a great deal of time, and suffered a loss of profits which he would have realized if the said contract had been performed and executed, to his damage in the sum of $85,000;

"And on the second count, for a balance of $15,000 that plaintiff alleges defendant is owing him for goods sold and delivered by plaintiff to defendant at his request and for moneys paid, laid out and expended by plaintiff for defendant, at his request, and for money lent by plaintiff to the defendant, at his request, and for moneys had and received by defendant to and for the use of the defendant.

"That the controversy in the said suit is only between citizens of different States, to-wit, your petitioner, who avers he was at the time of bringing this suit, and still is, a citizen of the State of Louisiana, and the said plaintiff who, as your petitioner avers, was then and still is, a citizen of the State of Michigan;

"And your petitioner herewith offers a bond with good and sufficient surety for his entering in the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, on the first day of its next session, a copy of the record in this suit, and for paying the costs that may be awarded by the said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto;

"And your petitioner prays this Honorable Court to proceed no further herein except to make an order for the removal of this case to the said Circuit Court and to accept the said surety and bond and cause the record herein to be removed into said Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri and he will ever pray, etc.

STEWART, ELIOT & WILLIAMS,
MOORE, SMITH & MOORE,
Attorneys for Defendant."

"State of Missouri, }
City of St. Louis. } ss.

I, J. D. Beardsley, being duly sworn do say that I have read the foregoing petition and know contents

thereof, and that the statements and allegations therein contained are true as I verily believe.

J. D. BEARDSLEY.

Subscribed and sworn to before me this the 17 day of March, 1906.

JOHN MCCLUSKEY BLANEY, JR.,
Notary Public."

My commission expires the 13th day of Oct., 1909.

And upon said day last aforesaid at the February Term of said Court, the said petition for removal and bond required by said act, was presented to said Court, and said Court made and entered of record an order, in words and figures as follows:

(Order of Removal.)

Saturday, March 17, 1906.

On this day there is filed herein and presented to the Court the petition of the defendant removal to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, accompanied by bond in the sum of five hundred dollars ($500.00) in the form required by law with J. H. Allen and J. H. Stegall as sureties, which bond is hereby duly approved and it appearing that the defendant is entitled under the statutes of the United States to remove this case into the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, it is therefore ordered that this case be, and the same is hereby removed to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, and it is further ordered that no further proceedings be taken in the cause in this court except the making of a transcript.

WALTER B. DOUGLAS,
Judge.

That afterwards and on the 19th day of March, 1906, being the first day of the then next succeeding term of the United States Court for the Eastern Division of the Eastern Judicial District of Missouri, within which division the City

of St. Louis is located, a duly certified transcript of the record of the proceedings of said Circuit Court of the City of St. Louis in said action was filed by said John D. Beardsley, defendant therein, in said Circuit Court of the United States for said Eastern Division of the Eastern Judicial District of Missouri, who thereupon entered his appearance therein, and said action was fully removed to said court last aforesaid.

And your petitioner further shows unto the Court that upon the removal as aforesaid of said action from said Circuit Court in and for the said City of St. Louis and State of Missouri to said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and before your petitioner had in any way appeared in said suit, or had done or been a party to any act, doing or proceeding in said suit, or had in any way acknowledged that said suit had been properly removed from said State Court to said Circuit Court of the United States, by appearance in, or by in any way prosecuting his said cause in said court, or doing anything whatsoever in said cause or connected with, or incident to the prosecution thereof, or had by any act or proceeding in said court acknowledged that said suit had been properly removed, or that said Circuit Court of the United States had jurisdiction by virtue of said removal, or otherwise, to retain said suit, or to take jurisdiction of said cause so removed as aforesaid, or to hold any plea therein, or take any step in the said cause, your petitioner appearing specially and solely for the purposes of the motion next hereinafter mentioned, and expressly denying that said court had jurisdiction of said cause, as appears on the face of said motion, did, on the 29th day of March, A. D. 1906, file in said Circuit Court of the United States, in said cause, a motion to remand said cause so removed as aforesaid to the Circuit Court of the City of St. Louis from whence it was removed, which said motion was and is in the words and figures following:

(Motion to Remand.)

In the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

"Abram C. Wisner, Plaintiff,
vs.
John B. Beardsley, Defendant.

"Now at this day comes plaintiff, by his attorneys, Jones, Jones & Hocker, and appearing specially for the purposes of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the Court to remand this cause to the Circuit Court of the City of St. Louis, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Michigan and the defendant a citizen and resident of the State of Louisiana, and the cause is not one within the original jurisdiction of this court, hence this court cannot acquire jurisdiction by removal.

JONES, JONES & HOCKER,
Attorneys for Plaintiff."

And your petitioner further shows to the Court that afterwards such proceedings were had in said Circuit Court of the United States, upon and in respect to said motion to remand, that said motion was duly heard by said court, and by the Honorable Gustave A. Finklenberg, Judge of the District Court of the United States, for said district, at the time holding the said Circuit Court of the United States, in pursuance to the statutes of the United States in such cases made and provided, and the motion having been duly considered by said court, said court did on the 2nd day of April, A. D. 1906, ren-

der its decision and judgment upon and in respect of said motion and did overrule said motion to remand said cause aforesaid, and did announce and file in said court a memorandum opinion or decision overruling said motion to remand, which is in words and figures as follows:

(Opinion on Motion to Remand.)

"A. C. Wisner, Plaintiff,
vs.
J. D. Beardsley, Defendant. } Memo. of Decision on Motion to Remand.

"FINKLENBERG, District Judge:

"In this matter I have examined the briefs submitted to me and the authorities therein cited so far as time would permit, particularly the cases of Foulk v. Gray, 120 Federal 156, and Rome Petroleum Company v. Hughes, 130 Federal, 585. I mention these two cases specially as representing the two views which may be taken of this question. In the absence of any controlling decision on this question and in view of the conflict of authorities, I can only follow what appears to my mind to be the more reasonable construction of the removal law, viz.: that under the circumstances prevailing in this case, it was removable, and that the motion to remand should be overruled.

"The question involved is a close one and I bear in mind that if the case is remanded there can be no appeal or review, of any kind, while if jurisdiction is retained, the decision of this Court, if erroneous, can be corrected.

"Since dictating the above my attention has been called to the case of Cochran v. Montgomery County, 199 U. S. 260. After due consideration of that case I do not think it settles the question here involved and I adhere to the above decision.

"The motion to remand will therefore be overruled."

And thereupon said Circuit Court of the United States for the district aforesaid made and entered an order of record that said motion to remand be, and the same was, overruled and denied.

And your petitioner further shows the Court that on the 27th day of March, A. D. 1906, the attorneys of said John D. Beardsley, defendant in said suit, served upon petitioner's attorneys a notice addressed to your petitioner, and to Jones, Jones & Hocker, his attorneys, that on the 30th day of March, 1906, and at 10 o'clock a. m., of that day, or as soon thereafter as counsel might be heard, they would present to said Circuit Court of the United States to which said cause was removed as aforesaid, a petition, of which a true copy was attached to said notice, at which time and place your petitioner or his attorneys might appear if they saw fit, and which said petition was filed in said cause on March 28, 1906, and prayed that the Mississippi Valley Trust Company, as garnishee in said cause, might be directed and ordered to turn over to the marshal of said court, such amount of the bonds garnished in its hands in said cause as aforesaid, as might be considered by the said Court sufficient to satisfy the claim of plaintiff in said cause and that upon compliance with the order of the Court to that effect said garnishee stand discharged, and that on said 30th day March, 1906, said petition was presented to said Court and your petitioner informed the said Court that he refused to appear in said cause for the disposition of said petition, or for any purpose whatsoever, and that he intended to apply to this Honorable Court for a writ of prohibition against the said Circuit Court of the United States retaining said cause on said removal aforesaid and assuming jurisdiction of said cause by virtue of said removal, or holding plea in said cause, or taking any steps or proceedings in said cause whatsoever except to remand said cause, and that thereupon said Court declared from the bench that it would withhold action on said petition last aforesaid in order that your petitioner might have an opportunity to make this application to this Court. And your petitioner further shows this Court that he has not since appeared in said cause or done any act or thing therein in any way acknowledging the jurisdiction of said Court

over said cause or over himself, or waiving his right to object to the jurisdiction thereof over said cause or himself, or acknowledging the right of said court to retain said cause in said court by virtue of said removal.

And your petitioner further shows to the Court that the second section of the Act of Congress, approved August 13, 1888, amendatory of the Act of Congress approved March 3rd, 1887, which amended the act approved March 3, 1875, after providing, in the first clause thereof, that causes of a civil nature, in law or in equity, arising under the Constitution, or laws, or treaties, of the United States (of which the Circuit Courts of the United States are by said clause given original jurisdiction by the preceding section), may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district, then provides in the second clause thereof as follows: **"Any other suit** of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction **by the preceding section"** (that is, by said section 1 of said act), "and which are now pending, or which may hereafter be brought, in any State Court, **may be removed** into the Circuit Court of the United States for the proper district by **the defendant or defendants therein, being non-residents of that State".**

And your petitioner further shows to the Court that the preceding section (being section one, of said act) referred to in said second section of said act, provides, in the first clause thereof, as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, **or in which there shall be**

a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid", and the said clause of said first section goes on and gives jurisdiction of other classes of suits, but your petitioner further shows the Court that by the next clause of the preceding, or first section, of said act, it is provided, among other things, as follows:

> "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court and **NO civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant."**

And your petitioner suggests to this Honorable Court that omitting the classes of suits of a civil nature removable under the first clause of the second section of said act, from the first clause of section one, all other classes of suits of a civil nature, specified in said first or preceding section of said act, remaining after such omission, fall within the terms "any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section", and are removable under said section, except as hereinafter suggested, and that among the other classes of suits remaining after such omission, are those **"in which there shall be a controversy between citizens of different States** in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid", that is, of two thousand dollars.

And your petitioner further suggests to the Court that said suit brought by your petitioner in the said Circuit Court

for the City of St. Louis and State of Missouri and removed therefrom to the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, as aforesaid (as appears from the face of the verified petition for removal of said cause from said Circuit Court of the City of St. Louis to said Circuit Court of the United States, and upon which said cause was removed as aforesaid from said Circuit Court for said City of St. Louis to said Circuit Court of the United States), is a suit in which there is a controversy between John D. Beardsley, the defendant therein, who was at the time of the bringing of said suit, and still is, a citizen of the State of Louisiana and who is and was a non-resident of the State of Missouri, and your petitioner, the plaintiff therein, who was at the time of the bringing of said suit and still is, a citizen of the State of Michigan and a non-resident of the State of Missouri, and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, to-wit, in the aggregate sum or value of one hundred thousand dollars, and is therefore a suit in which there is a controversy between citizens of different States, involving the jurisdictional amount, and therefore removable under the said second clause of the said second section of said act, unless it is taken out of the operation of said second clause of said second section of said act by the effect of the second clause of the preceding (or first, or jurisdictional) section of said act.

And your petitioner further suggests to this Court that it nowhere appears in the said petition for removal above set out, and on which said cause was removed as aforesaid, or from any proceeding in said suit, that either the said John D. Beardsley, the said defendant in said suit removed as aforesaid, or your petitioner, the plaintiff in said suit, is either a citizen of the State of Missouri, or an inhabitant or resident of said Eastern District of Missouri, or of the Eastern Division thereof, in which said Circuit Court of the United States (to

which said suit was removed as aforesaid) is held, and over and within which said court exercises the jurisdiction conferred by said act; and your petitioner suggests that all that appears from the face of said petition for removal, upon which said cause was removed as aforesaid, and from the proceedings in said suit, is that said John D. Beardsley, the defendant in said suit, is a citizen of Louisiana and a non-resident of the State of Missouri, and that your petitioner, the plaintiff in said suit, is a citizen of Michigan as hereinbefore suggested, but your petitioner suggests that said showing is insufficient for the reasons now about to be assigned.

Your petitioner further suggests to this Honorable Court that the second clause of the preceding or first section of said act, hereinbefore quoted, restrains the jurisdiction conferred by the first clause of said preceding or first section of said act; that the last part of said second clause of said preceding, or first, section of said act, which provides, "but when the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant" is by way of proviso to the preceding part of said second clause of said preceding or first section, which provides that **"no civil action shall be brought** before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant"; and further suggests that the words "district of residence of" in view of the previous legislation on the subject is equivalent to "district whereof he is an inhabitant", and that the effect is that where the jurisdiction is founded or attempted to be founded upon any of the causes mentioned in section one of said act, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant, but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit must be brought in the district in which either the plaintiff, or

in the district in which the defendant, resides, and cannot be construed as giving jurisdiction **by reason of citizenship,** to a Circuit Court held in a State **of which neither party is a citizen,** but on the contrary, restricts the jurisdiction **to the district in which one of the parties resides within the State of which he is a citizen,** and that it confers no jurisdiction upon the Circuit Court of the United States of any suit brought before such courts in a State of which neither party to said suit is a citizen and in a district of which neither party to such suit is an inhabitant and resident.

And your petitioner further suggests that his said suit so brought and removed as aforesaid, is a suit, as will appear from what has already been suggested and shown to this Honorable Court in which it does not appear from said petition for removal or anything filed or any proceedings had in this cause, that either of the parties thereto is a citizen of the State of Missouri or an inhabitant or resident of the Eastern Judicial District of Missouri, or of the Eastern Division thereof, and that the jurisdiction upon which said removal was had, and upon which said Circuit Court of the United States has refused to remand said cause, brought before it by said removal and upon which it has decided to retain same in said court and to take cognizance thereof and to hold plea therein, was and is solely founded upon the fact that the parties to said suit were, at the times it was brought and removed as aforesaid, and still are, citizens of different States, without it appearing in any wise in said cause from said petition for removal or on the record or from the proceedings therein, that either said John D. Beardsley, the defendant in said suit, or your petitioner, was at the time said suit was filed as aforesaid, or when it was removed as aforesaid, or since, or is now, a citizen of Missouri, or that either said defendant Beardsley, or your petitioner, was, when said suit was filed as aforesaid, or when it was removed as aforesaid, an inhabitant or a resident of said Eastern District of Missouri, or said Eastern

Division of said District, in which the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to which said suit of your petitioner was removed as aforesaid, is held, and jurisdiction is not given by said section one of said Act to the Circuit Courts of the United States of suits in which the jurisdiction is founded solely on the fact that there is a controversy between citizens of different States where it does not further appear that either the plaintiff or the defendant is a citizen of the State within which the suit is brought and an inhabitant and resident of the district to which it is removed.

And your petitioner further suggests to this Honorable Court that the removal of said cause under the second clause of the second section of said act, under which it must be removed as above suggested, depends on it being a suit of which said Circuit Court for the Eastern Judicial District of Missouri, as one of the Circuit Courts of the United States, is given jurisdiction by the first section of said act itself, and said Court not being given jurisdiction of such suits as that of plaintiff, for the reasons aforesaid, said suit of plaintiff does not come within the second clause of said second section of said act, and cannot be, and was not, lawfully removed under said section, but, on the contrary, the same was unlawfully and improperly removed as aforesaid, and neither said removal, nor said act, confers upon said Court any lawful authority or power to retain said cause in said Circuit Court, or for said Circuit Court to assume jurisdiction of said cause so removed into the same, or to hold plea in the same, or to do anything whatsoever in said cause, except to remand the same to said Circuit Court for the City of St. Louis, in which it was brought and from which it was removed, which it has refused to do as aforesaid.

And your petitioner further suggests to this Honorable Court that said suit so commenced by him as aforesaid, was, until its said removal as aforesaid, wholly before and within

the jurisdiction of said State court in which it was commenced as aforesaid, a jurisdiction wholly independent of, and different from, that of said Circuit Court of the United States to which said suit was removed as aforesaid, and derived and proceeding from another and altogether different sovereign, and was until said removal wholly from before, and wholly without, the jurisdiction of said Circuit Court of the United States to which it was removed as aforesaid, and that the sole, only and first **proceeding** by which said suit was brought before said Court as aforesaid, and at all within its cognizance, was the means by which said removal was effected as aforesaid, pursuant to said act of Congress, and for that reason **said proceeding** for removal was, and is, an **original proceeding** to bring said suit before the said Circuit Court of the United States and within its cognizance, within the meaning of the second clause of the first section of said Act of Congress; that the last part of the second clause of the first section of said act prohibits the bringing of any suit whatever "by any original process or proceeding" where the jurisdiction is founded only on the fact that the action is between citizens of different States, except only in the district of the residence of either the plaintiff or the defendant; that your petitioner's suit is one where the jurisdiction is attempted to be founded only on the fact that the action is between citizens of different States, and said petition for the removal of your petitioner's suit, made as aforesaid, does not show on its face, or in any way whatever, that either said John D. Beardsley, the defendant in said suit, or your petitioner, is either a citizen of the State of Missouri, or a resident or inhabitant of said Eastern District of Missouri, or of the Eastern Division thereof, the State, district and division of said district in which said Circuit Court of the United States before which said suit of your petitioner was brought by said original proceeding of removal, is held, and that by reason thereof said removal as aforesaid is within the said prohibition of said statute and is improper,

unlawful and in violation of the said act and laws of the United States in such cases made and provided, and said Circuit Court acquired, and could acquire, no jurisdiction whatever of, or over, said cause or your petitioner by virtue of said suit being brought before it by ruch removal as aforesaid.

And your petitioner further suggests to this Honorable Court that if said suit had been brought by original process in said United States Circuit Court, to which it was removed as aforesaid, the citizenship being the same, so that the complaint (or bill) did not, and could not, show that either the plaintiff or the defendant therein was a citizen of the State or an inhabitant or resident of the district or division of the district in which said court was held, then upon proper objection made by the defendant (to-wit, that being defendant, he was not subject to the jurisdiction of said court on account of said prohibition of said act, unless he voluntarily submit himself to its jurisdiction), the Court would refuse to entertain jurisdiction of said cause and dismiss the cause, and if he voluntarily submitted himself to the jurisdiction of said court instead of objecting to its jurisdiction, then both the plaintiff (by bringing said suit in said court), and the defendant (by voluntarily appearing in said cause), would have submitted themselves voluntarily to the jurisdiction of said court and the court would therefore have jurisdiction to proceed with the cause.

And your petitioner further suggests to this Honorable Court that when the cause is brought in the first instance in a State court, that said act forbids the same being brought by the original proceeding of removal, before said Circuit Court of the United States, when it does not appear from the petition of removal that either the said plaintiff or the said defendant therein is a citizen of the State, or an inhabitant or resident of the district or division of the district, in which the said Circuit Court of the United States to which it is so removed, is held, and the said act by further providing that the party removing shall give bond to pay costs, if said Circuit

Court shall hold that said suit was wrongfully or improperly removed, and by providing that whenever said Court shall decide that said cause was improperly removed it shall remand the same to the State court from whence it came, and because of the prohibition in said second clause of said first section of said act against the bringing of said suit except as therein provided before said Circuit Court of the United States, clearly gives the plaintiff in case of removal the right to object to the jurisdiction of said Circuit Court to which the said suit was removed both on account of a wrongful, and also of the improper removal of said suit; so that to give jurisdiction in case of such a wrongful or improper removal not only must the defendant submit himself to the jurisdiction of the Court to which he removes said suit, and thus waive his privilege to the prohibition of the act aforesaid, but the plaintiff must submit himself to said Court to which the removal is made (either expressly, or by failing to avail himself of the prohibition of the act aforesaid by objecting in said Court, to said removal as wrongful and improper and moving the Court to remand the case); hence your petitioner suggests that in the bringing of this suit before the Court by the **original proceeding of removal,** as in case of bringing suit before the Court by **original process,** not only the party bringing the suit before the Court by removal (that is, **the defendant), must acquiesce** in the jurisdiction of the Court to which removal is made over the said prohibition of said act, but **the plaintiff also must acquiesce therein,** and your petitioner further suggests that he has not, as shown by the record in said cause in said Circuit Court of the United States to which said cause was removed, acquiesced, in any way, in the assumption of jurisdiction of said case by said Circuit Court of the United States to which said cause was removed as aforesaid, but, on the contrary, he has at all times objected to said Court retaining said cause, or assuming jurisdiction thereof, by virtue of said removal, or otherwise, or of holding plea therein, or to its doing anything

whatsoever in or about the same, except remand said cause to said State Court from which it came, as in such cases provided in said act.

And your petitioner further suggests to this Honorable Court that there is and has been for a long time past a great conflict of decision among the courts of the United States, over which this Honorable Court has supervisory jurisdiction, in respect to the question of removal to, and of the jurisdiction of, the Circuit Courts of the United States, which is now brought before this Honorable Court by this application; that in some jurisdictions said courts hold such removals proper and lawful and that they have and acquire jurisdiction of causes so removed, notwithstanding the objection of the other party on the grounds aforesaid, and they retain causes so removed, and assume and exercise jurisdiction over the same by virtue thereof, while in other jurisdictions said courts hold such removals to be wrongful and improper and deny their jurisdiction by virtue of any such removals and remand the causes so removed to the State courts from which they came; that such contrariety of opinion and decision is clearly pointed out in the opinion of the Court herein before quoted, denying petitioner's motion to remand; and it is for this reason (beside the wrong about to be done by the said Court of exercising jurisdiction in excess of that conferred by the laws of the United Stafes, and in violation of said laws, and to the wrong and injury of your petitioner), the duty of your petitioner to bring said matters involved in this application to the attention and before this Court, that this Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your petitioner further suggests to this Honorable Court that the decisions of the courts of the United States over which this Honorable Court has supervisory jurisdiction and control, upon and in reference to such removals as are brought before this Court by this application, and the juris-

diction of said Circuit Courts of the United States by virtue of such removals over the causes so removed, and over the plaintiffs therein objecting to the jurisdiction, and the right of said Circuit Court to retain such removals against the timely objection of plaintiffs therein, are, as your petitioner is advised, in conflict with the decisions and utterances of this Court, so far as they have gone, in construing the first and second sections of said act of Congress, and the prior similar acts, and that for this reason it is the duty, and it is right and proper, and your petitioner ought, to bring said matters involved in this application to the attention, and before this Court, in order that the Honorable Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your petitioner further shows unto this Honorable Court that all matters of fact hereinbefore recited and alleged, save and except those of which this Honorable Court takes judicial notice, and which are recited and alleged as facts of which your petitioner is advised, appear from the record of said suit so brought by your petitioner and the proceedings in said State court and in said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri to which said suit was removed as aforesaid, a copy of which record containing the proceedings in said State court as filed in said Circuit Court of the United States upon the removal of said cause thereto, and the record of the action and proceedings of said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, since the removal of said cause to it as aforesaid, is filed with this application.

And your petitioner further suggests to this Honorable Court that notwithstanding the premises, the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, by the overruling of said motion of your petitioner to remand said suit to said State

court from which it was removed as aforesaid, has decided and determined to retain said cause in court and to assume and to exercise jurisdiction over the same by reason of it having been brought before by said court by removal as aforesaid and to hold plea therein, and that said Court will retain the same by reason of its said decision and determination on said motion to remand, and is about to, and will, assume and exercise jurisdiction over the said suit so removed, and hold plea therein, and will assert and attempt to exercise jurisdiction over said suit so removed, and hold plea therein, all in excess of the jurisdiction conferred upon it by the said act and the laws of the United States, and in contempt of said act and the laws of the United States, and will compel your petitioner either to abandon his said suit, or to submit himself to the jurisdiction of said court in said suit, by virtue of said removal and the retention thereof in said court and the wrongful and unlawful assertion and exercise by said court of jurisdiction as aforesaid, and your petitioner is advised that the question involved in this application is whether the said Circuit Court of the United States has jurisdiction at all of said suit so removed as aforesaid under said petition of removal, and to retain the same in said court where your petitioner has not waived his right to object to such wrongful and unlawful assertion and exercise of jurisdiction as said court has and is about and will exercise by reason of its retaining said cause in said court and refusing to remand it as improperly and wrongfully removed and not within its jurisdiction; and your petitioner is further advised that if he shall appear in said suit in said court or do any act or thing to recognize the right of said court to take cognizance of said suit in said court and hold plea therein, he will thereby forfeit and waive his right thereafter to object that said removal of said suit so had as aforesaid was and is

wrongful and improper and be precluded from afterwards asserting that exercise of jurisdiction which said Circuit Court has, and is about to, and will assert and exercise over said suit, was and is wrongful and unlawful and improper and in excess of its jurisdiction given by said act and the laws of the United States, and that your petitioner has and will have no adequate remedy, or any remedy, against such unlawful and wrongful exercise of jurisdiction which said court has, is about and will exercise as aforesaid in retaining said suit in said court and taking cognizance thereof and holding plea therein as aforesaid for that petitioner is without the right of effective appeal, notwithstanding the power of this court to review cases involving jurisdiction by removal, for that petitioner cannot appear in said cause, and invoke the processes of the court (as he must do continually being plaintiff therein), and afterwards object to the jurisdiction thus from time to time invoked by him.

Wherefore your petitioner, the said Abram C. Wisner, the aid of this Honorable Court most respectfully requesting, prays that a writ of mandamus may issue to the said Gustave A. Finklenburg, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, holding the Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, directing and commanding him, to remand the said suit of Abram C. Wisner, plaintiff, v. John D. Beardsley, defendant, to the Circuit Court of the City of St. Louis and State of Missouri, from whence said suit was removed, or, on failure so to do, that he show cause to this Court, on a day to be named in said writ why said cause should not be so remanded.

James C. Jones

Of counsel for Petitioner.

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief.

James C. Jones

Of counsel for Petitioner.

State of Missouri, } ss.
City of St. Louis, }

James C. Jones, being duly sworn on his oath, states that he is agent and attorney of the petitioner, Abram C. Wisner, that he was counsel for the petitioner in charge as his attorney of the case of Abram C. Wisner v. John D. Beardsley, referred to in the foregoing petition, both in the Circuit Court of the City of St. Louis, State of Missouri, and in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri; that he has personal knowledge of the matters and things stated in the foregoing petition; that the matters and things stated in the foregoing petition are true, except insofar as they are stated on advice or information and as to these affiant verily believes them to be true.

James C Jones

Subscribed and sworn to before me this 14 day of April, 1906.

My term expires July 31, 1907

Myron M Medske

Notary Public in and for the City of St. Louis, State of Missouri.

FILE COPY.

Supreme Court U. S.
FILED
APR 23 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

~~No. 24 Orig.~~ 1

EX PARTE ABRAM C. WISNER

10 Orig'l.

O.T.1906

PETITION FOR WRIT OF PROHIBITION

ORIGINAL PROCEEDING No.

OLIVER & MECARTNEY,
JONES, JONES & HOCKER,
J. J. DARLINGTON,
Counsel for Petitioner

IN THE

Supreme Court of the United States

EX PARTE ABRAM C. WISNER

PETITION FOR WRIT OF PROHIBITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Abram C. Wisner, and gives this Honorable Court to understand and be informed:

That on the 17th day of February, A. D. 1906, your petitioner commenced a civil action at law by attachment in the

Circuit Court in and for the City of St. Louis and State of Missouri, against one John D. Beardsley, by filing in said court a petition, together with an affidavit that said Beardsley was not a resident of said State and was a resident of the State of Louisiana (in conformity to the statutes of said State concerning attachments), returnable to the April Term of said court, to recover from said Beardsley on a cause of action set forth in the first count of said petition the sum of eighty-five thousand dollars, for breach of a certain option contract, executed and delivered by said Beardsley to your petitioner for the sale, transfer and delivery by said Beardsley to your petitioner of a majority of the shares of the capital stock of the Louisiana and Northwest Railroad Company, and for the sale to petitioner of another certain contract between said Beardsley and said Railroad Company under which said Beardsley had built the line of railroad owned by said company in the States of Louisiana and Arkansas, by the terms of which said Beardsley was to receive, and there was due and owing to him bonds of said Railroad Company, secured by first mortgage upon its property, aggregating one million seven hundred and twenty-five thousand dollars, together with all rights, benefits and advantages, accrued or to accrue to said Beardsley under said contract, and for all of which your petitioner was to pay said Beardsley the sum of $1,495,000 in the manner specified in said contract, and also to recover on another and different cause of action, in the second count of said petition set forth, fifteen thousand dollars for goods sold and delivered, money paid and laid out and expended by your petitioner for said Beardsley at his instance and request, and money had and received by said Beardsley to the use of your petitioner.

And your petitioner further shows to the Court that upon the filing of said petition and affidavit in said Circuit Court a writ of attachment in the usual form, issued out of said Circuit Court, in due course in said cause on the said 17th day of February, A. D. 1906, dated on said day, directed to the sheriff

of said City of St. Louis, commanding him to attach the said John D. Beardsley by all and singular his lands, tenements, goods, chattels, rights, moneys, credits, evidences of debt or so much thereof as should be sufficient to satisfy the plaintiff's claim, and also that he summon as garnishees all persons in whose hands or possession soever any personal property, rights, credits, evidences of debt, effects or money of said defendant might be, or who might be named by the plaintiff in said cause (your petitioner herein) or his attorneys, as garnishees, and that they said garnishees so summoned to appear before said Circuit Court of the City of St. Louis on the first day of its next term to be holden on the first Monday, the second day of April, 1906, and said writ was returnable to the first day of the next term of said court to be held in said city on the first Monday of April, 1906, to-wit, April 2, 1906, which writ was in due course delivered to said sheriff; and that said sheriff, as appears from his return on said writ, dated the 17th day of March, A. D. 1906, made to said April Term of said court, according to the command of said writ, executed said writ, on said 17th day of February, by returning that no goods, chattels or real estate were found by him in said city belonging to the defendant, the said John D. Beardsley, whereon to levy said writ and make the debt and costs, and by thereupon attaching by direction of your petitioner's attorneys, in the hands of the Mississippi Valley Trust Company, a corporation in said City of St. Louis, by a written declaration (as required by the statutes of said State in such cases made and provided) directed to the said corporation, and delivered said declaration to Breckenridge Jones, Vice-President of said corporation (he being in the office of said corporation and having charge thereof), all debts due from it to said defendant in said action, John D. Beardsley, and all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt of or belonging to the said defendant in said action, the said John D. Beardsley, or so much thereof as would be sufficient to satisfy the

debt, interest and costs of said action, and by summoning it in writing as garnishee by a written summons of garnishment, directed to said corporation and delivering the said amount of garnishment to said Breckenridge Jones, Vice-President thereof, requiring it to appear before said Circuit Court at the return term of said writ, to-wit, on the first Monday in April next, to-wit, April, A. D. 1906, to answer such interrogatories as might be exhibited and propounded to it by the plaintiff named in said summons; and your petitioner further shows that said writ also directed the sheriff of said city to summon the said John D. Beardsley to be and appear at the then next term of said Circuit Court and before the Judges thereof, on the first day of the then next term of said court to be holden in the City of St. Louis on the first Monday of April, 1906, to-wit, on the second day of April, 1906; and as appears from a further return made by said sheriff of said writ to said court as aforesaid, said sheriff also executed said writ on the 17th day of March, A. D. 1906, by delivering in said City of St. Louis, a copy of the writ and petition as furnished by the clerk of said court to John D. Beardsley, the defendant therein, thereby summoning the said defendant to be and appear before said court on the day named in said writ, which said summons was executed in the manner and form provided by the statutes of said State for the personal service of process in civil actions.

And your petitioner further shows to the Court that on the 17th day of March, A. D. 1906, and before the commencement of the April Term of said Circuit Court (that is before the first Monday in April, A. D. 1906), to which said writ of attachment and said summons of garnishment was returnable, and before the filing of the petition and bond for the removal of said action from said Circuit Court of the City St. Louis hereinafter set forth and described, and before and without the filing by your petitioner of the interrogatories which the laws of said State require to be filed by the plaintiff in cases of

garnishment and before the time limited in said laws for the filing of interrogatories had run or expired, and before the return day of said cause, to-wit, on the said 17th day of March, 1906, The Mississippi Valley Trust Company, garnishee in said action as aforesaid, filed in said Circuit Court of the City of St. Louis, answers to certain purported interrogatories, in which answer to said purported interrogatories it stated among other things, as follows:

(Answer of Garnishee.)

"Further answering said interrogatories, said garnishee states that it has in its possession property belonging to said John D. Beardsley, or in which he may be interested, consisting of the amounts of bonds of the Louisiana and North West Railroad Company hereinafter described.

"Said garnishee further states that it is a corporation organized under the laws of Missouri, and among other powers, is authorized to act as trustee under corporate mortgages; that it is trustee under a mortgage deed of trust of the Louisiana & North West Railroad Company, a corporation organized under the laws of the State of Louisiana, dated the first day of April, 1905, securing an authorized issue of bonds of said Railroad Company to the amount of $10,000,000 of even date with said mortgage, bearing interest at 5% per annum, payable semi-annually as evidenced by interest coupons thereto attached, which bonds are payable on the first day of April, 1935; that said mortgage provides none of said bonds shall be valid until authenticated by this garnishee as trustee and said mortgage fully sets out the terms and conditions upon which the bonds are to be authenticated; that said garnishee files herewith printed copy of said mortgage as Exhibit 'A' to this, its answer; that under article 2, section 1 of said mortgage, it is provided, among other things, that said garnishee, as trustee shall authenticate bonds to the amount of $1,725,000, face value, and deliver to the Railroad Company, or on its order, on filing with the trustee a copy of a resolution of the board of directors

of said railroad company, certified under the corporate seal thereof by a proper officer, requesting such delivery; that pursuant to the provisions of said mortgage, on or about the 12th day of February, 1906, there was filed with said trustees a certified copy of minutes of meeting of the board of directors of said railroad company held January 15, 1906, at which meeting said directors adopted resolutions directing the delivery of $1,725,000 face value of bonds, and under the terms of said mortgage it became the duty of said trustee to authenticate and deliver such bonds upon receipt of said certified copy of said minutes; that all of said bonds were authenticated as provided in said mortgage on the 16th day of February, 1906; that among the resolutions adopted by said board was a resolution as follows: 'The trustee in the first mortgage is further requested to deliver to J. D. Beardsley or order first mortgage gold bonds of the face value of $230,000, and to Geo. W. Hunter and J. D. Beardsley, or upon their joint order, first mortgage gold bonds of the face value of $320,000'; that none of said $230,000 or of said $320,000 of bonds have been delivered by said garnishee as trustee aforesaid, and at the time when garnishment process was served as aforesaid, said bonds duly authenticated were, and since that time have been, and at the present time are, in the hands of this garnishee as trustee under the conditions aforesaid. What are the rights of said Beardsley to said $230,000 face value of bonds or said $320,000 face value of bonds, this garnishee has no information beyond what is herein stated.''

And your petitioner further shows the Court that afterwards at the February Term of said Circuit Court and on the 17th day of March, A. D. 1906, and before the day of the commencement of said April Term aforesaid, and before it was required by the laws of the State of Missouri, or the rule of said State court in which said action was brought, to answer or plead to the said petition filed therein as aforesaid, the said John D. Beardsley, the defendant in said action, by his attorneys, Stewart, Eliot & Williams and Moore, Smith & Moore,

made and filed in said action in said Circuit Court in and for the City of St. Louis and State of Missouri, for the removal of said action from said court last aforesaid into the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, the Circuit Court of the United States to be held in the district where such action was pending, the petition and bond required for removal of causes by the third section of the Act of Congress of August 13, 1888, amendatory of the Acts of March 3, 1887, and March 3, 1875, which said petition was and is in the words and figures following:

(Petition for Removal.)

In the Circuit Court of the City of St. Louis, Missouri, April Term, 1906.

"Abram C. Wisner, Plaintiff,
vs.
John D. Beardsley, Defendant.

To the Honorable ....., *Judge of the Circuit Court of St. Louis.*

"Your petitioner respectfully shows that he is the defendant in the above entitled suit, and that he is a non-resident of the State in which the said suit was brought, to-wit, Missouri, and the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of $2,000;

"That the said suit is of a civil nature, being a suit, upon the first count, brought by the plaintiff for the breach of a contract or option given him by the defendant for the sale, transfer and delivery to plaintiff of a majority of the shares of the capital stock of the Louisiana and North West Railroad Co., together with the right, interest and title of the defendant in a certain contract between said defendant and the Louisiana & North West Railroad Co. for the issuance and delivery to the defendant of the first mortgage bonds of said Railroad Company of the aggregate face value of $1,725,-

000; that for the alleged breach of said contract plaintiff claims he was put to great expense and trouble, and expended a great deal of time, and suffered a loss of profits which he would have realized if the said contract had been performed and executed, to his damage in the sum of $85,000;

"And on the second count, for a balance of $15,000 that plaintiff alleges defendant is owing him for goods sold and delivered by plaintiff to defendant at his request and for moneys paid, laid out and expended by plaintiff for defendant, at his request, and for money lent by plaintiff to the defendant, at his request, and for moneys had and received by defendant to and for the use of the defendant.

"That the controversy in the said suit is only between citizens of different States, to-wit, your petitioner, who avers he was at the time of bringing this suit, and still is, a citizen of the State of Louisiana, and the said plaintiff who, as your petitioner avers, was then and still is, a citizen of the State of Michigan;

"And your petitioner herewith offers a bond with good and sufficient surety for his entering in the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, on the first day of its next session, a copy of the record in this suit, and for paying the costs that may be awarded by the said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto;

"And your petitioner prays this Honorable Court to proceed no further herein except to make an order for the removal of this case to the said Circuit Court and to accept the said surety and bond and cause the record herein to be removed into said Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri and he will ever pray, etc.

STEWART, ELIOT & WILLIAMS,
MOORE, SMITH & MOORE,
Attorneys for Defendant."

"State of Missouri, }
City of St. Louis. } ss.

I, J. D. Beardsley, being duly sworn do say that I have read the foregoing petition and know contents

thereof, and that the statements and allegations therein contained are true as I verily believe.

J. D. BEARDSLEY.

Subscribed and sworn to before me this the 17 day of March, 1906.

JOHN MCCLUSKEY BLANEY, JR.,
Notary Public."

My commission expires the 13th day of Oct., 1909.

And upon said day last aforesaid at the February Term of said Court, the said petition for removal and bond required by said act, was presented to said Court, and said Court made and entered of record an order, in words and figures as follows:

(Order of Removal.)

Saturday, March 17, 1906.

On this day there is filed herein and presented to the Court the petition of the defendant removal to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, accompanied by bond in the sum of five hundred dollars ($500.00) in the form required by law with J. H. Allen and J. H. Stegall as sureties, which bond is hereby duly approved and it appearing that the defendant is entitled under the statutes of the United States to remove this case into the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, it is therefore ordered that this case be, and the same is hereby removed to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, and it is further ordered that no further proceedings be taken in the cause in this court except the making of a transcript.

WALTER B. DOUGLAS,
Judge.

That afterwards and on the 19th day of March, 1906, being the first day of the then next succeeding term of the United States Court for the Eastern Division of the Eastern Judicial District of Missouri, within which division the City

of St. Louis is located, a duly certified transcript of the record of the proceedings of said Circuit Court of the City of St. Louis in said action was filed by said John D. Beardsley, defendant therein, in said Circuit Court of the United States for said Eastern Division of the Eastern Judicial District of Missouri, who thereupon entered his appearance therein, and said action was fully removed to said court last aforesaid.

And your petitioner further shows unto the Court that upon the removal as aforesaid of said action from said Circuit Court in and for the said City of St. Louis and State of Missouri to said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and before your petitioner had in any way appeared in said suit, or had done or been a party to any act, doing or proceeding in said suit, or had in any way acknowledged that said suit had been properly removed from said State Court to said Circuit Court of the United States, by appearance in, or by in any way prosecuting his said cause in said court, or doing anything whatsoever in said cause or connected with, or incident to the prosecution thereof, or had by any act or proceeding in said court acknowledged that said suit had been properly removed, or that said Circuit Court of the United States had jurisdiction by virtue of said removal, or otherwise, to retain said suit, or to take jurisdiction of said cause so removed as aforesaid, or to hold any plea therein, or take any step in the said cause, your petitioner appearing specially and solely for the purposes of the motion next hereinafter mentioned, and expressly denying that said court had jurisdiction of said cause, as appears on the face of said motion, did, on the 29th day of March, A. D. 1906, file in said Circuit Court of the United States, in said cause, a motion to remand said cause so removed as aforesaid to the Circuit Court of the City of St. Louis from whence it was removed, which said motion was and is in the words and figures following:

(Motion to Remand.)

In the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

"Abram C. Wisner, Plaintiff,
vs.
John B. Beardsley, Defendant.

"Now at this day comes plaintiff, by his attorneys, Jones, Jones & Hocker, and appearing specially for the purposes of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the Court to remand this cause to the Circuit Court of the City of St. Louis, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Michigan and the defendant a citizen and resident of the State of Louisiana, and the cause is not one within the original jurisdiction of this court, hence this court cannot acquire jurisdiction by removal.

JONES, JONES & HOCKER,
Attorneys for Plaintiff."

And your petitioner further shows to the Court that afterwards such proceedings were had in said Circuit Court of the United States, upon and in respect to said motion to remand, that said motion was duly heard by said court, and by the Honorable Gustave A. Finklenberg, Judge of the District Court of the United States, for said district, at the time holding the said Circuit Court of the United States, in pursuance to the statutes of the United States in such cases made and provided, and the motion having been duly considered by said court, said court did on the 2nd day of April, A. D. 1906, ren-

der its decision and judgment upon and in respect of said motion and did overrule said motion to remand said cause aforesaid, and did announce and file in said court a memorandum opinion or decision overruling said motion to remand, which is in words and figures as follows:

(Opinion on Motion to Remand.)

"A. C. Wisner, Plaintiff,
vs.
J. D. Beardsley, Defendant. } Memo. of Decision on Motion to Remand.

"FINKLENBERG, District Judge:

"In this matter I have examined the briefs submitted to me and the authorities therein cited so far as time would permit, particularly the cases of Foulk v. Gray, 120 Federal 156, and Rome Petroleum Company v. Hughes, 130 Federal, 585. I mention these two cases specially as representing the two views which may be taken of this question. In the absence of any controlling decision on this question and in view of the conflict of authorities, I can only follow what appears to my mind to be the more reasonable construction of the removal law, viz.: that under the circumstances prevailing in this case, it was removable, and that the motion to remand should be overruled.

"The question involved is a close one and I bear in mind that if the case is remanded there can be no appeal or review, of any kind, while if jurisdiction is retained, the decision of this Court, if erroneous, can be corrected.

"Since dictating the above my attention has been called to the case of Cochran v. Montgomery County, 199 U. S. 260. After due consideration of that case I do not think it settles the question here involved and I adhere to the above decision.

"The motion to remand will therefore be overruled."

And thereupon said Circuit Court of the United States for the district aforesaid made and entered an order of record that said motion to remand be, and the same was, overruled and denied.

And your petitioner further shows the Court that on the 27th day of March, A. D. 1906, the attorneys of said John D. Beardsley, defendant in said suit, served upon petitioner's attorneys a notice addressed to your petitioner, and to Jones, Jones & Hocker, his attorneys, that on the 30th day of March, 1906, and at 10 o'clock a. m., of that day, or as soon thereafter as counsel might be heard, they would present to said Circuit Court of the United States to which said cause was removed as aforesaid, a petition, of which a true copy was attached to said notice, at which time and place your petitioner or his attorneys might appear if they saw fit, and which said petition was filed in said cause on March 28, 1906, and prayed that the Mississippi Valley Trust Company, as garnishee in said cause, might be directed and ordered to turn over to the marshal of said court, such amount of the bonds garnished in its hands in said cause as aforesaid, as might be considered by the said Court sufficient to satisfy the claim of plaintiff in said cause and that upon compliance with the order of the Court to that effect said garnishee stand discharged, and that on said 30th day March, 1906, said petition was presented to said Court and your petitioner informed the said Court that he refused to appear in said cause for the disposition of said petition, or for any purpose whatsoever, and that he intended to apply to this Honorable Court for a writ of prohibition against the said Circuit Court of the United States retaining said cause on said removal aforesaid and assuming jurisdiction of said cause by virtue of said removal, or holding plea in said cause, or taking any steps or proceedings in said cause whatsoever except to remand said cause, and that thereupon said Court declared from the bench that it would withhold action on said petition last aforesaid in order that your petitioner might have an opportunity to make this application to this Court. And your petitioner further shows this Court that he has not since appeared in said cause or done any act or thing therein in any way acknowledging the jurisdiction of said Court

over said cause or over himself, or waiving his right to object to the jurisdiction thereof over said cause or himself, or acknowledging the right of said court to retain said cause in said court by virtue of said removal.

And your petitioner further shows to the Court that the second section of the Act of Congress, approved August 13, 1888, amendatory of the Act of Congress approved March 3rd, 1887, which amended the act approved March 3, 1875, after providing, in the first clause thereof, that causes of a civil nature, in law or in equity, arising under the Constitution, or laws, or treaties, of the United States (of which the Circuit Courts of the United States are by said clause given original jurisdiction by the preceding section), may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district, then provides in the second clause thereof as follows: **"Any other suit** of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction **by the preceding section"** (that is, by said section 1 of said act), "and which are now pending, or which may hereafter be brought, in any State Court, **may be removed** into the Circuit Court of the United States for the proper district by **the defendant or defendants therein, being non-residents of that State".**

And your petitioner further shows to the Court that the preceding section (being section one, of said act) referred to in said second section of said act, provides, in the first clause thereof, as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, **or in which there shall be**

a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid", and the said clause of said first section goes on and gives jurisdiction of other classes of suits, but your petitioner further shows the Court that by the next clause of the preceding, or first section, of said act, it is provided, among other things, as follows:

> "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court and **NO civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant.**"

And your petitioner suggests to this Honorable Court that omitting the classes of suits of a civil nature removable under the first clause of the second section of said act, from the first clause of section one, all other classes of suits of a civil nature, specified in said first or preceding section of said act, remaining after such omission, fall within the terms "any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section", and are removable under said section, except as hereinafter suggested, and that among the other classes of suits remaining after such omission, are those **"in which there shall be a controversy between citizens of different States** in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid", that is, of two thousand dollars.

And your petitioner further suggests to the Court that said suit brought by your petitioner in the said Circuit Court

for the City of St. Louis and State of Missouri and removed therefrom to the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, as aforesaid (as appears from the face of the verified petition for removal of said cause from said Circuit Court of the City of St. Louis to said Circuit Court of the United States, and upon which said cause was removed as aforesaid from said Circuit Court for said City of St. Louis to said Circuit Court of the United States), is a suit in which there is a controversy between John D. Beardsley, the defendant therein, who was at the time of the bringing of said suit, and still is, a citizen of the State of Louisiana and who is and was a non-resident of the State of Missouri, and your petitioner, the plaintiff therein, who was at the time of the bringing of said suit and still is, a citizen of the State of Michigan and a non-resident of the State of Missouri, and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, to-wit, in the aggregate sum or value of one hundred thousand dollars, and is therefore a suit in which there is a controversy between citizens of different States, involving the jurisdictional amount, and therefore removable under the said second clause of the said second section of said act, unless it is taken out of the operation of said second clause of said second section of said act by the effect of the second clause of the preceding (or first, or jurisdictional) section of said act.

And your petitioner further suggests to this Court that it nowhere appears in the said petition for removal above set out, and on which said cause was removed as aforesaid, or from any proceeding in said suit, that either the said John D. Beardsley, the said defendant in said suit removed as aforesaid, or your petitioner, the plaintiff in said suit, is either a citizen of the State of Missouri, or an inhabitant or resident of said Eastern District of Missouri, or of the Eastern Division thereof, in which said Circuit Court of the United States (to

which said suit was removed as aforesaid) is held, and over and within which said court exercises the jurisdiction conferred by said act; and your petitioner suggests that all that appears from the face of said petition for removal, upon which said cause was removed as aforesaid, and from the proceedings in said suit, is that said John D. Beardsley, the defendant in said suit, is a citizen of Louisiana and a non-resident of the State of Missouri, and that your petitioner, the plaintiff in said suit, is a citizen of Michigan as hereinbefore suggested, but your petitioner suggests that said showing is insufficient for the reasons now about to be assigned.

Your petitioner further suggests to this Honorable Court that the second clause of the preceding or first section of said act, hereinbefore quoted, restrains the jurisdiction conferred by the first clause of said preceding or first section of said act; that the last part of said second clause of said preceding, or first, section of said act, which provides, "but when the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant" is by way of proviso to the preceding part of said second clause of said preceding or first section, which provides that **"no civil action shall be brought** before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant"; and further suggests that the words "district of residence of" in view of the previous legislation on the subject is equivalent to "district whereof he is an inhabitant", and that the effect is that where the jurisdiction is founded or attempted to be founded upon any of the causes mentioned in section one of said act, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant, but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit must be brought in the district in which either the plaintiff, or

in the district in which the defendant, resides, and cannot be construed as giving jurisdiction **by reason of citizenship,** to a Circuit Court held in a State **of which neither party is a citizen,** but on the contrary, restricts the jurisdiction **to the district in which one of the parties resides within the State of which he is a citizen,** and that it confers no jurisdiction upon the Circuit Court of the United States of any suit brought before such courts in a State of which neither party to said suit is a citizen and in a district of which neither party to such suit is an inhabitant and resident.

And your petitioner further suggests that his said suit so brought and removed as aforesaid, is a suit, as will appear from what has already been suggested and shown to this Honorable Court in which it does not appear from said petition for removal or anything filed or any proceedings had in this cause, that either of the parties thereto is a citizen of the State of Missouri or an inhabitant or resident of the Eastern Judicial District of Missouri, or of the Eastern Division thereof, and that the jurisdiction upon which said removal was had, and upon which said Circuit Court of the United States has refused to remand said cause, brought before it by said removal and upon which it has decided to retain same in said court and to take cognizance thereof and to hold plea therein, was and is solely founded upon the fact that the parties to said suit were, at the times it was brought and removed as aforesaid, and still are, citizens of different States, without it appearing in any wise in said cause from said petition for removal or on the record or from the proceedings therein, that either said John D. Beardsley, the defendant in said suit, or your petitioner, was at the time said suit was filed as aforesaid, or when it was removed as aforesaid, or since, or is now, a citizen of Missouri, or that either said defendant Beardsley, or your petitioner, was, when said suit was filed as aforesaid, or when it was removed as aforesaid, an inhabitant or a resident of said Eastern District of Missouri, or said Eastern

Division of said District, in which the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to which said suit of your petitioner was removed as aforesaid, is held, and jurisdiction is not given by said section one of said Act to the Circuit Courts of the United States of suits in which the jurisdiction is founded solely on the fact that there is a controversy between citizens of different States where it does not further appear that either the plaintiff or the defendant is a citizen of the State within which the suit is brought and an inhabitant and resident of the district to which it is removed.

And your petitioner further suggests to this Honorable Court that the removal of said cause under the second clause of the second section of said act, under which it must be removed as above suggested, depends on it being a suit of which said Circuit Court for the Eastern Judicial District of Missouri, as one of the Circuit Courts of the United States, is given jurisdiction by the first section of said act itself, and said Court not being given jurisdiction of such suits as that of plaintiff, for the reasons aforesaid, said suit of plaintiff does not come within the second clause of said second section of said act, and cannot be, and was not, lawfully removed under said section, but, on the contrary, the same was unlawfully and improperly removed as aforesaid, and neither said removal, nor said act, confers upon said Court any lawful authority or power to retain said cause in said Circuit Court, or for said Circuit Court to assume jurisdiction of said cause so removed into the same, or to hold plea in the same, or to do anything whatsoever in said cause, except to remand the same to said Circuit Court for the City of St. Louis, in which it was brought and from which it was removed, which it has refused to do as aforesaid.

And your petitioner further suggests to this Honorable Court that said suit so commenced by him as aforesaid, was, until its said removal as aforesaid, wholly before and within

the jurisdiction of said State court in which it was commenced as aforesaid, a jurisdiction wholly independent of, and different from, that of said Circuit Court of the United States to which said suit was removed as aforesaid, and derived and proceeding from another and altogether different sovereign, and was until said removal wholly from before, and wholly without, the jurisdiction of said Circuit Court of the United States to which it was removed as aforesaid, and that the sole, only and first **proceeding** by which said suit was brought before said Court as aforesaid, and at all within its cognizance, was the means by which said removal was effected as aforesaid, pursuant to said act of Congress, and for that reason **said proceeding** for removal was, and is, an **original proceeding** to bring said suit before the said Circuit Court of the United States and within its cognizance, within the meaning of the second clause of the first section of said Act of Congress; that the last part of the second clause of the first section of said act prohibits the bringing of any suit whatever "by any original process or proceeding" where the jurisdiction is founded only on the fact that the action is between citizens of different States, except only in the district of the residence of either the plaintiff or the defendant; that your petitioner's suit is one where the jurisdiction is attempted to be founded only on the fact that the action is between citizens of different States, and said petition for the removal of your petitioner's suit, made as aforesaid, does not show on its face, or in any way whatever, that either said John D. Beardsley, the defendant in said suit, or your petitioner, is either a citizen of the State of Missouri, or a resident or inhabitant of said Eastern District of Missouri, or of the Eastern Division thereof, the State, district and division of said district in which said Circuit Court of the United States before which said suit of your petitioner was brought by said original proceeding of removal, is held, and that by reason thereof said removal as aforesaid is within the said prohibition of said statute and is improper,

unlawful and in violation of the said act and laws of the United States in such cases made and provided, and said Circuit Court acquired, and could acquire, no jurisdiction whatever of, or over, said cause or your petitioner by virtue of said suit being brought before it by ruch removal as aforesaid.

And your petitioner further suggests to this Honorable Court that if said suit had been brought by original process in said United States Circuit Court, to which it was removed as aforesaid, the citizenship being the same, so that the complaint (or bill) did not, and could not, show that either the plaintiff or the defendant therein was a citizen of the State or an inhabitant or resident of the district or division of the district in which said court was held, then upon proper objection made by the defendant (to-wit, that being defendant, he was not subject to the jurisdiction of said court on account of said prohibition of said act, unless he voluntarily submit himself to its jurisdiction), the Court would refuse to entertain jurisdiction of said cause and dismiss the cause, and if he voluntarily submitted himself to the jurisdiction of said court instead of objecting to its jurisdiction, then both the plaintiff (by bringing said suit in said court), and the defendant (by voluntarily appearing in said cause), would have submitted themselves voluntarily to the jurisdiction of said court and the court would therefore have jurisdiction to proceed with the cause.

And your petitioner further suggests to this Honorable Court that when the cause is brought in the first instance in a State court, that said act forbids the same being brought by the original proceeding of removal, before said Circuit Court of the United States, when it does not appear from the petition of removal that either the said plaintiff or the said defendant therein is a citizen of the State, or an inhabitant or resident of the district or division of the district, in which the said Circuit Court of the United States to which it is so removed, is held, and the said act by further providing that the party removing shall give bond to pay costs, if said Circuit

Court shall hold that said suit was wrongfully or improperly removed, and by providing that whenever said Court shall decide that said cause was improperly removed it shall remand the same to the State court from whence it came, and because of the prohibition in said second clause of said first section of said act against the bringing of said suit except as therein provided before said Circuit Court of the United States, clearly gives the plaintiff in case of removal the right to object to the jurisdiction of said Circuit Court to which the said suit was removed both on account of a wrongful, and also of the improper removal of said suit; so that to give jurisdiction in case of such a wrongful or improper removal not only must the defendant submit himself to the jurisdiction of the Court to which he removes said suit, and thus waive his privilege to the prohibition of the act aforesaid, but the plaintiff must submit himself to said Court to which the removal is made (either expressly, or by failing to avail himself of the prohibition of the act aforesaid by objecting in said Court, to said removal as wrongful and improper and moving the Court to remand the case); hence your petitioner suggests that in the bringing of this suit before the Court by the **original proceeding of removal,** as in case of bringing suit before the Court by **original process,** not only the party bringing the suit before the Court by removal (that is, **the defendant), must acquiesce** in the jurisdiction of the Court to which removal is made over the said prohibition of said act, but **the plaintiff also must acquiesce therein,** and your petitioner further suggests that he has not, as shown by the record in said cause in said Circuit Court of the United States to which said cause was removed, acquiesced, in any way, in the assumption of jurisdiction of said case by said Circuit Court of the United States to which said cause was removed as aforesaid, but, on the contrary, he has at all times objected to said Court retaining said cause, or assuming jurisdiction thereof, by virtue of said removal, or otherwise, or of holding plea therein, or to its doing anything

whatsoever in or about the same, except remand said cause to said State Court from which it came, as in such cases provided in said act.

And your petitioner further suggests to this Honorable Court that there is and has been for a long time past a great conflict of decision among the courts of the United States, over which this Honorable Court has supervisory jurisdiction, in respect to the question of removal to, and of the jurisdiction of, the Circuit Courts of the United States, which is now brought before this Honorable Court by this application; that in some jurisdictions said courts hold such removals proper and lawful and that they have and acquire jurisdiction of causes so removed, notwithstanding the objection of the other party on the grounds aforesaid, and they retain causes so removed, and assume and exercise jurisdiction over the same by virtue thereof, while in other jurisdictions said courts hold such removals to be wrongful and improper and deny their jurisdiction by virtue of any such removals and remand the causes so removed to the State courts from which they came; that such contrariety of opinion and decision is clearly pointed out in the opinion of the Court herein before quoted, denying petitioner's motion to remand; and it is for this reason (beside the wrong about to be done by the said Court of exercising jurisdiction in excess of that conferred by the laws of the United Stafes, and in violation of said laws, and to the wrong and injury of your petitioner), the duty of your petitioner to bring said matters involved in this application to the attention and before this Court, that this Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your petitioner further suggests to this Honorable Court that the decisions of the courts of the United States over which this Honorable Court has supervisory jurisdiction and control, upon and in reference to such removals as are brought before this Court by this application, and the juris-

diction of said Circuit Courts of the United States by virtue of such removals over the causes so removed, and over the plaintiffs therein objecting to the jurisdiction, and the right of said Circuit Court to retain such removals against the timely objection of plaintiffs therein, are, as your petitioner is advised, in conflict with the decisions and utterances of this Court, so far as they have gone, in construing the first and second sections of said act of Congress, and the prior similar acts, and that for this reason it is the duty, and it is right and proper, and your petitioner ought, to bring said matters involved in this application to the attention, and before this Court, in order that the Honorable Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your petitioner further shows unto this Honorable Court that all matters of fact hereinbefore recited and alleged, save and except those of which this Honorable Court takes judicial notice, and which are recited and alleged as facts of which your petitioner is advised, appear from the record of said suit so brought by your petitioner and the proceedings in said State court and in said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri to which said suit was removed as aforesaid, a copy of which record containing the proceedings in said State court as filed in said Circuit Court of the United States upon the removal of said cause thereto, and the record of the action and proceedings of said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, since the removal of said cause to it as aforesaid, is filed with this application.

And your petitioner further suggests to this Honorable Court that notwithstanding the premises, the said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, by the overruling of said motion of your petitioner to remand said suit to said State

court from which it was removed as aforesaid, has decided and determined to retain said cause in court and to assume and to exercise jurisdiction over the same by reason of it having been brought before by said court by removal as aforesaid and to hold plea therein, and that said Court will retain the same by reason of its said decision and determination on said motion to remand, and is about to, and will, assume and exercise jurisdiction over the said suit so removed, and hold plea therein, and will assert and attempt to exercise jurisdiction over said suit so removed, and hold plea therein, all in excess of the jurisdiction conferred upon it by the said act and the laws of the United States, and in contempt of said act and the laws of the United States, and will compel your petitioner either to abandon his said suit, or to submit himself to the jurisdiction of said court in said suit, by virtue of said removal and the retention thereof in said court and the wrongful and unlawful assertion and exercise by said court of jurisdiction as aforesaid, and your petitioner is advised that the question involved in this application is whether the said Circuit Court of the United States has jurisdiction at all of said suit so removed as aforesaid under said petition of removal, and to retain the same in said court where your petitioner has not waived his right to object to such wrongful and unlawful assertion and exercise of jurisdiction as said court has and is about and will exercise by reason of its retaining said cause in said court and refusing to remand it as improperly and wrongfully removed and not within its jurisdiction; and your petitioner is further advised that if he shall appear in said suit in said court or do any act or thing to recognize the right of said court to take cognizance of said suit in said court and hold plea therein, he will thereby forfeit and waive his right thereafter to object that said removal of said suit so had as aforesaid was and is

wrongful and improper and be precluded from afterwards asserting that exercise of jurisdiction which said Circuit Court has, and is about to, and will assert and exercise over said suit, was and is wrongful and unlawful and improper and in excess of its jurisdiction given by said act and the laws of the United States, and that your petitioner has and will have no adequate remedy, or any remedy, against such unlawful and wrongful exercise of jurisdiction which said court has, is about and will exercise as aforesaid in retaining said suit in said court and taking cognizance thereof and holding plea therein as aforesaid for that petitioner is without the right of effective appeal, notwithstanding the power of this court to review cases involving jurisdiction by removal, for that petitioner cannot appear in said cause, and invoke the processes of the court (as he must do continually being plaintiff therein), and afterwards object to the jurisdiction thus from time to time invoked by him.

Wherefore your petitioner, the said Abram C. Wisner, the aid of this Honorable Court most respectfully requesting, prays remedy by writ of prohibition to be issued out of this Honorable Court to the said Honorable Gustave A. Finklenberg, Judge of the District Court of the United States for the Eastern Judicial District of Mo., holding the said Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Mo., before whom said cause is pending, to be directed, to prohibit him from asserting and exercising jurisdiction over said suit so removed as aforesaid, or to hold plea therein, the premises aforesaid, anywise concerning further before him, in said Circuit Court, or from retaining said suit in said Circuit Court by virtue of said removal, or from taking any steps in the said suit so removed as aforesaid, except to remand the same pursuant to the statutes of the United States in such cases made and provided to said Circuit Court for the City of St. Louis and State of Mis-

souri from which it was removed to said Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

James C. Jones

Of counsel for Petitioner.

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief.

James C. Jones

Of counsel for Petitioner.